No. 80-1457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT L. HARDIN

Petitioner

v.

PITNEY BOWES INCORPORATED

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDGAR A. ZINGMAN
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Respondent, Pitney Bowes Incorporated

Of Counsel:

SHERYL G. SNYDER
KIMBERLY K. GREENE
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The sole question presented by this case is whether the record in this individual, non-class, age discrimination action reveals any genuine issue of material fact which precludes the District Court from granting summary judgment for the employer.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1-3
SUMMARY OF ARGUMENT	3
ARGUMENT	3-7
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES:	
Anderson v. Viking Pump Division, Houdaille Industries, Inc., 545 F.2d 1127 (8th Cir. 1976)	6
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978)	4
Brennan v. Reynolds & Co., 367 F.Supp. 440 (N.D. Ill. 1973)	6
Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972)	6
First National Bank v. Cities Service Co., 391 U.S. 253 (1968)	5,6,7
Fleischhaker v. Adams, 481 F.Supp. 285 (D.C.D.C. 1979)	7
Furnco Construction Co. v. Waters, 438 U.S. 567 (1978)	4
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	4
Minor v. Lakeview Hospital, 434 F.Supp. 633 E.D. Wisc. 1977), *aff'd*, 582 F.2d 1284 (7th Cir. 1978)	7
Stovall v. City of St. Louis Board of Education, 469 F.Supp. 551 (E.D. Mo. 1979), *aff'd*, 614 F.2d 619 (8th Cir. 1980)	7
Texas Department of Community Affairs v. Burdine, 49 U.S. L.W. 4214 (3/4/81)	4
RULES OF PROCEDURE	
Rule 56, Fed.R.Civ.P.	5,6,7

No. 80-1457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT L. HARDIN

Petitioner

v.

PITNEY BOWES INCORPORATED

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Pitney-Bowes Incorporated, opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 28, 1980.

COUNTERSTATEMENT OF THE CASE

The Petitioner is a former salesman for Pitney-Bowes whose employment was terminated due to insufficient sales volume. The record demonstrates that all Pitney-Bowes salesmen, regardless of age, were required to meet a monthly sales quota of $7,200. On deposition Petitioner admitted that the monthly quota was "very acceptable," that he was warned on at least three occasions that his failure to meet the quota would result in his discharge, and that he nevertheless continued to

produce sales substantially beneath the minimum quota. After failing for several consecutive months to meet the monthly sales standard for the Louisville branch office, Petitioner was discharged.

The Petitioner then filed a complaint with the Kentucky Commission on Human Rights alleging that he was terminated from his employment with Pitney-Bowes because of his age. He also notified the Secretary of Labor pursuant to Section 626(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621, *et seq.* (the "Act"). The Kentucky Commission on Human Rights found ". . . .no probable cause to substantiate the complainant's allegations of discrimination. . . .", and the Secretary of Labor issued notice, pursuant to Section 626(d) of the Act, allowing the Petitioner to pursue his claim individually, which he did.

After extensive discovery by both parties, Pitney-Bowes moved for summary judgment. The deposition of Petitioner proved he had regularly failed to meet his sales quota. The affidavits filed with the motion proved that a number of employees under the age of 40 had also been discharged for failing to meet the same sales quota. In fact, the record demonstrated that only two of nine Pitney-Bowes employees discharged from the Louisville office during the relevant time period were over the age of 40. Most significantly, Petitioner never alleged that the sales quota was a pretext utilized to discharge him and not a bona fide employment policy applied equally to other salesmen. All he ever argued was that his failure to meet the sales quota was explainable by the unproductivity of the sales territory to which he was assigned and the general state of the economy.

On this record, the District Court correctly determined that there was no genuine issue of material fact. The District Judge said:

> A reading of the plaintiff's deposition, coupled with an examination of the entire record, compels the conclusion that plaintiff's discharge was for failure to perform his duties in a satisfactory manner and was not the result of age discrimination by the defendant.

See, Petition for a Writ of Certiorari, p. 12. The United States Court of Appeals for the Sixth Circuit affirmed. After recounting the evidence described above, the Court of Appeals said:

> On this undisputed record we cannot say that the district judge committed error in granting summary judgment to Pitney-Bowes.

See, Petition for a Writ of Certorari, p. 14. This Petition followed.

SUMMARY OF ARGUMENT

The courts below correctly applied the standards erected by this Court allocating the burden of proof in employment discrimination cases, and correctly applied the requirements of Rule 56(e) for granting summary judgment. There are, therefore, no special or important reasons for granting the petition in this case.

ARGUMENT

The record in this individual, nonclass, age discrimination case reveals absolutely no genuine issue of material fact to be adjudicated at trial, much less an issue meriting review by this Court. Both the District Court and the Court of Appeals for the Sixth Circit employed the proper procedures and adhered to prevailing law in granting and affirming the summary judgment. That result presents no special or important issue, nor does it create any conflict among the circuits.

As grounds for granting his petition, the Petitioner asserts that the courts below departed from the standards established by this Court for allocating the burden of proof in employment discrimination cases and departed from the standards for granting summary judgment. However, the summary judgment entered by the District Court and affirmed by the Sixth Circuit was squarely based upon the allocation of proof required by this Court for individual employment discrimination cases

alleging disparate treatment. *See, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978); *Board of Trustees of State College v. Sweeney,* 439 U.S. 24 (1978). Even assuming arguendo that the Petitioner established a prima facie case of discrimination based on age, Pitney-Bowes presented evidence which amply rebutted that prima facie case and Petitioner failed to offer any evidence that the business reason articulated by Pitney-Bowes for his termination was actually a pretext.

As this Court recently held in *Texas Department of Community Affairs v. Burdine,* 49 U.S.L.W. 4214 (March 4, 1981):

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff [citations omitted]. The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.
>
> . . .
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons.

While Pitney-Bowes was required only to "articulate some legitimate, nondiscriminatory reason for the employee's rejection," *McDonnell, supra* at 802, rather than to "persuade the court that it was actually motivated by the proffered reasons," *Burdine, supra* at 4215, Pitney-Bowes provided ample evidence that the Petitioner was terminated for substandard job performance. At no time has the Petitioner denied the accuracy of the evidence submitted in this regard by Pitney-Bowes. Instead, he

has admitted his failure to meet his sales quota and blamed that failure on the economy.

Nor is it persuasive for Petitioner to argue that summary judgment was an inappropriate remedy on the facts of this case. The Petitioner's duties in response to Pitney-Bowes' motion for summary judgment are expressly set forth in Fed.R.Civ.P. 56(e), which provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party *may not rest upon the mere allegations or denials of his pleading,* but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial (emphasis added).

The Petitioner in the present case has made no attempt to comply with this requirement of Rule 56. Rather, he seems to argue that he becomes entitled to a full trial merely by establishing a prima facie case and that Rule 56(e) has no application in employment discrimination cases. He is wrong in both assertions.

This Court has held that Rule 56(e) means precisely what it says. In *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 289-90 (1968), an antitrust case, this Court refused to accept the argument now propounded by the Petitioner, stating:

> Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible of the interpretation which he sought to give them. That holding is correct. *To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled*

> *with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it.* While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint (emphasis added).

The lower federal courts have properly applied the *Cities Service Co.* holding to grant motions for summary judgment in employment discrimination cases. In *Anderson v. Viking Pump Division, Houdaille Industries, Inc.*, 545 F.2d 1127, 1129, (8th Cir. 1976), a case in which the plaintiff alleged a violation of the Age Discrimination in Employment Act, the court stated:

> [The employer's] unrefuted affidavits showed that Anderson was not rehired because of his previous below-average performance on the job and that his position was left unfilled for a substantial period of time. Thus, the facts pertaining to the termination of Anderson's employment at Viking were not in dispute. They established that Viking based its decision not to rehire on Anderson's previously poor performance, which constitutes "good cause" under the ADEA, 29 U.S.C. §623(f)(3). Anderson failed to set forth specific facts showing that there was a genuine issue for trial, *Brennan v. Reynolds & Co.*, 367 F.Supp. 440 (N.D. Ill. 1973), and the District Court's grant of Viking's motion for summary judgment was proper. FED.R.CIV.P. 56; see, *Cervantes v. Time, Inc.* 464 F.2d 986 (8th Cir. 1972). *While summary judgment is an extreme remedy and is to be granted only where the facts clearly demonstrate no genuine issue to be tried, the adverse party may not rest upon his pleadings but must set forth specific facts showing a genuine issue for trial* (emphasis added).

See also, Fleischhaker v. Adams, 481 F.Supp. 285 (D.C.D.C. 1979); *Stovall v. City of St. Louis Board of Education,* 469 F.Supp. 551 (E.D. Mo. 1979), *aff'd,* 614 F.2d 619 (8th Cir. 1980); and *Minor v. Lakeview Hospital,* 434 F.Supp. 633 (E.D. Wisc. 1977), *aff'd,* 582 F.2d 1284 (7th Cir. 1978), wherein the court expressly applied *Cities Service Co.* in an employment discrimination suit, stating:

> While, generally, an issue regarding the motivation of a defendant is not susceptible to a motion for summary judgment, such issues may be examined upon a summary judgment motion to determine if the plaintiff is able to present some affirmative evidence regarding the discriminatory motivation of the defendant. The Supreme Court has recognized this utilization of Rule 56 in antitrust cases.

The courts below found that the Petitioner had not set forth any specific facts indicating Pitney-Bowes' sales quota was a pretext for age discimination, and that disposition of the instant case by summary judgment was therefore appropriate under the criteria established by this Court and Rule 56(e). That holding need not be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDGAR A. ZINGMAN
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Respondent, Pitney-Bowes Incorporated

Of Counsel:

SHERYL G. SNYDER
KIMBERLY K. GREENE
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202